Hon. Kathy Hochul
Governor of New York State
NYS State Capitol Building
Albany, NY 12224

Hon. Andrea Stewart-Cousins
President and Majority Leader of the New York State Senate
State Capitol Building
Albany, NY 12247

Hon. Carl E. Heastie
Speaker of the New York State Assembly
State Capitol Building
Albany, NY 12248

Dear Governor Hochul, Majority Leader Stewart-Cousins, and Speaker Heastie:

We are law professors from across New York state, writing to add our collective voice to the demands for a safer and more just New York. That commitment compels **a resolute rejection of Governor Hochul's proposal to eliminate from New York law the statutorily-defined purpose of bail - ensuring an accused person's return to court - and the legal standard for imposing it.** As scholars who teach and study the law, we are familiar with its capacity for reproducing violence and entrenching systemic inequities. It is that familiarity that informs our staunch opposition to Governor Hochul's plan, which would eviscerate New York's long standing approach to pretrial detention and send more Black, brown, and low-income New Yorkers to jail.

Gov. Hochul's Proposal Would Undo the Well-considered and Long-standing Purpose of Bail

Governor Hochul's proposal discards the 2019 codification of long-standing legislative principles, and is contrary to decades of New York's refusal to cave to racist and classist 'tough on crime' policies in the context of bail and pre-trial detention. Prior to the 1960s, the universal consideration across our nation for whether to set bail was the accused person's risk of failing to appear for court. In 1951, more than a decade before the NY Legislature began revising the criminal procedure code, the Supreme Court held in *Stack v. Boyle*[1] that bail set at a figure higher than needed to ensure a defendant's presence at future proceedings is "excessive" under the Eighth Amendment. But as Richard Nixon weaponized racist fear to increase the police and carceral state, states began to implement bail laws to include risk of flight *and* future dangerousness.

Our state lawmakers also explored future dangerousness and preventative detention during the 1960s, forming a temporary commission to provide recommendations to revise the penal and criminal procedure code. These considerations were soundly rejected after years of investigation and state hearings, leading to the passage of the bail laws in 1971 which affirmed the purpose of bail in New York: to ensure a person's return to court. In 1987, the Supreme Court declared in *U.S. v.*

[1] *Stack v. Boyle*, 342 U.S. 1, 5 (1951)

Salerno that "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[2] The Governor now seeks to undo that norm and threaten the liberty of those she is elected to govern by completely removing the standards guarding against the carefully limited exception.

The Governor's Proposal Would Exacerbate Racial Disparities and Wealth-Based Detention

Before the sweeping changes passed in 2019 and enacted in 2020, tens of thousands of New Yorkers, the majority of them Black and brown[3], languished in dangerous and often deadly local jails. When bail reform was passed in 2019, it was expected to result in a 40 percent reduction in the state's pretrial jail population. The actual reduction proved much more modest: only 15% in the two years following its enactment. This underperformance was a political and moral failure. Multiple rounds of rollbacks – the first within only four months of the law's passage – were driven by Willie Horton-esque soundbites based in racist fearmongering rather than fact. As a result, racial disparities in pretrial detention have continued to widen. According to a 2023 report from the Data Collaborative for Justice, "Black and Brown people are disproportionately represented in New York City jail admissions, making up almost 90% of admissions, despite only comprising 52% of the City's general population."[4]

Governor Hochul's proposal to eviscerate the long-codified purpose of bail would further increase these racial disparities. A decision-making vacuum would be left in its wake, primed to be filled with calculations of "future dangerousness". Studies have repeatedly shown that assignations of dangerousness are nothing more than a proxy for race.[5] Indeed, a 2020 study revealed that New York City judges were 50% more likely to set higher bail for Black people accused of violent felony charges than for similarly-situated white people facing identical charges.[6]

As the United States Supreme Court acknowledged in *Buck v. Davis*, "[B]lack men as 'violence prone'" is a "powerful racial stereotype"[7] and a "disturbing departure from the basic premise that our criminal law punishes people for what they do, not who they are."[8] Rather than endeavoring to eradicate continued racial disparities, Governor Hochul's proposal provides them greater room to flourish. It will come at an immense and highly predictable cost: Black communities, Black families, and Black lives.

Governor Hochul's Proposal Would Sow Confusion and Eliminate Judicial Review

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[2] *United States v. Salerno*, 481 U.S. 739, 755 (1987)
[3]https://www.criminaljustice.ny.gov/crimnet/ojsa/comparison-population-arrests-prison-demographics/2019%20Population%20Arrests%20Prison%20by%20Race.pdf
[4] https://www.jjay.cuny.edu/news/despite-reforms-racial-disparities-jail-admissions-getting-worse-2016
[5]Cynthia E. Jones, "'Give Us Free': Addressing Racial Disparities in Bail Determinations," New York University Journal of Legislation and Public Policy 16, no. 4 (2013), 919-62, 938-39, https://perma.cc/manage/create?folder=13469-16845-29608-41698.
[6]https://static1.squarespace.com/static/5b6de4731aef1de914f43628/t/60f5c1af1a4e121640f8564f/1626718640158/Roadmap_for_Reducing_Jail_NYC.pdf
[7] *Buck v. Davis,* 137 S. Ct. 759, 776 (2017)
[8] *Id.,* at 766.

Contrary to the Governor's false claims that the reforms stripped judges of discretion in their bail decisions, the current law in fact requires judges to consider a comprehensive list of factors, including a person's past history and the current allegations against them, to determine whether that person presents "a risk of flight to avoid prosecution."[9] If a judge finds the person poses a risk of flight, they then impose the "least restrictive conditions" necessary to ensure their return to court. This decision-making process is replete with opportunities for judicial consideration and discretion. What's more, contrary to the Governor's oft repeated assertion that judges are confused by the laws and unsure about their ability to impose bail on bail eligible offenses, the state court Chief of Administration Justin Barry has clarified in public hearings that judges are *not* confused and are thoroughly trained on the bail laws and procedures.[10]

Both the legal standard and legal purpose in the current law simply, but crucially, serve as measuring posts by which judges consider statutory factors. They are present not to eliminate or even drastically curtail judicial discretion, but to ensure that judges do not substitute their own prejudices and penological philosophies for long-standing principles of New York law. Removing the legal standard and purpose would not clarify the law as the Governor contends. Instead, it would sow confusion and lead to even greater unequal outcomes for New Yorkers. There would be more people locked up in our deadly jails, presumed innocent, awaiting trial. Removing the legal standard and purpose would also strip from the courts the ability to review bail decisions for abuses of discretion by evaluating whether the factors were considered in line with a legal standard. Indeed, we know of no other state with a bail law that contains no standard whatsoever, as the Governor is proposing.

The Governor's Proposal Must be Wholly and Soundly Rejected

The Governor's proposal is a political distraction that seeks to satisfy the never-satisfied racist call to incarcerate our way to safety. A study released March 16th, 2023 by the John Jay Data Collaborative on Justice[11] demonstrated that the data backs up what has always been true: **pretrial detention makes it more likely, not less, that people will be arrested again**. And fewer people in jail means fewer people subjected to the cycle of violence caused by incarceration and its destabilizing effect on families and communities.

The proposal must be rejected in whole. Only by refusing to cede this high and moral ground can we return to legislating real opportunities to make our communities feel safe and thrive. We, the undersigned law professors, applaud our lawmakers for rejecting the Governor's chaotic and unsound proposal and urge them to remain steadfast to the principle of fundamental fairness for all as budget negotiations continue.

Sincerely,

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[9] CPL § 510.10(1)
[10] https://www.nysenate.gov/calendar/public-hearings/january-30-2023/joint-public-hearing-criminal-justice-data at 3:05:49-3:06:00
[11] Does New York's Bail Reform Law Impact Recidivism? A Quasi-Experimental Test in New York City by René Ropac and Michael Rempel, March 2023

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